LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 24 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 289

ANNE P. NEWMAN, SHARON W. NEAL
and JOHN MUNGIN,

Petitioners,

—v.—

PIGGIE PARK ENTERPRISES, INC., a corporation
and L. MAURICE BESSINGER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL MELTSNER
10 Columbus Circle
New York, New York

MATTHEW J. PERRY
LINCOLN C. JENKINS, JR.
HEMPHILL P. PRIDE, II
1107½ Washington Street
Columbia, South Carolina

Attorneys for Petitioners

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	2
Statement	2
Summary of Argument	6
ARGUMENT	7
I. Whether Counsel Fees Are Awarded to a Prevailing Plaintiff Under the Public Accommodations Title of the Civil Rights Act of 1964 Should Not Turn on the Subjective Mental State of the Defendant	7
A. The Fourth Circuit's standard	9
B. The standard which best effectuates the ends of Title II	11
C. Judge Winter's standard	16
II. Under Either the Standard Sought by Petitioners or That Urged by Judges Winter and Sobeloff, the Case Should Be Remanded to the Courts Below With Instructions to Award Counsel Fees to Plaintiff	16
CONCLUSION	18

Table of Cases

PAGE

Bell v. School Board of Powhatan County, 321 F. 2d 494 (4th Cir. 1963) 10

Fleischman v. Maier Brewing Co., 386 U. S. 714 (1967) 15

Georgia v. Rachel, 384 U. S. 780 (1966) 8

Gilbert v. Hoisting & Portable Engineers, 237 Or. 139, 390 P. 2d 320 (1964) 13

Hamm v. City of Rock Hill, 379 U. S. 306 (1964) 8

Heart of Atlanta Motel v. U. S., 379 U. S. 241 (1964) .. 8

Katzenbach v. McClung, 371 U. S. 291 (Dec. 1964) 17

Rolax v. Atlantic Coast Lines R.R., 186 F. 2d 473 (4th Cir. 1951) 10, 13

Vaughn v. Atkinson, 369 U. S. 527 (1962) 10

Statutes:

28 U. S. C. §1254(1) 2

Civil Rights Act of 1964, 42 U. S. C. §2000a 2, 3, 7

42 U. S. C. §2000a(b) (1-4) 8

42 U. S. C. §2000a(c) 8

42 U. S. C. §2000a(c)(2) 4

42 U. S. C. §2000a(d) 8

42 U. S. C. §2000a-1 8

42 U. S. C. §2000a-2 8

PAGE

42 U. S. C. §2000a-3 8

42 U. S. C. §2000a-3(b) 2, 9, 11, 14

42 U. S. C. §2000a-5(a) 8

42 U. S. C. §2000a-5(b) 8

42 U. S. C. §2000a-6(a) 9

Other Authorities:

110 Cong. Rec. 14214 (June 17, 1964) 9, 10

Comment, Private Attorneys-General: Group Action in the Fight for Civil Liberties, 58 Yale Law Journal 574 (1949) 13

Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Cal. L. Rev. 792 (1966) 14

"Integration in the South: Erratic Pattern" New York Times, May 29, 1967 11

6 Moore's Federal Practice 1352 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 339

ANNE P. NEWMAN, SHARON W. NEAL
and JOHN MUNGIN,

Petitioners,

—v.—

PIGGIE PARK ENTERPRISES, INC., a corporation
and L. MAURICE BESSINGER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 377 F. 2d 433 (A. 159a). The opinion of the United States District Court for the District of South Carolina is reported at 256 F. Supp. 941 (A. 135a).

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 24, 1967. The petition for a writ of certiorari was granted October 9, 1967. Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1254(1).

Question Presented

Whether the Court of Appeals correctly construed Title II of the Civil Rights Act of 1964 as denying recovery of counsel fees by Negroes excluded from places of public accommodation unless a showing is made that a restaurateur's patently frivolous defenses and obstructive tactics were the product of dishonesty and bad faith.

Statutory Provisions Involved

This case involves Title II of the Civil Rights Act of 1964, 42 U. S. C. §§2000a et seq., and more particularly, 42 U. S. C. §2000a-3(b):

> In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . .

Statement

Negro plaintiffs instituted this class action December 18, 1964 against the corporate operator of a chain of six restaurants and its president and principal stockholder,

L. Maurice Bessinger, seeking injunctive relief prohibiting exclusion of Negroes and recovery of counsel fees pursuant to the Civil Rights Act of 1964, 42 U. S. C. §§2000a et seq. The complaint alleged, in summary, that at various locations in South Carolina the corporation operates restaurants which affect commerce and where Negroes are refused service (A. 2a-8a).

Defendants answered by denying Negroes were refused service; that operation of the restaurants affected commerce; and that the restaurants were places of "public accommodation" as that term is defined in the Civil Rights Act of 1964.[1] Defendants asserted that Title II is unconstitutional in violation of the Commerce Clause (Art. I, §8); the Privileges and Immunities Clause (Art. IV, §2); the Due Process and Equal Protection Clauses of the Fourteenth Amendment; and the Thirteenth Amendment to the Constitution of the United States. In addition, the corporation president alleged that service of food to Negroes, as required by Title II, violated his freedom of religion as protected by the First Amendment (A. 9a-21a).

After a two day trial, April 4-5 (A. 22a-134a), the district court found that the corporation operates six eating places, five of which are drive-ins located on major highways (A. 140a-141a). The sixth, Little Joe's Sandwich Shop, is in downtown Columbia, South Carolina, with tables and chairs for approximately sixty customers (A. 141a-143a). The district court found "at least" forty percent of the food purchased by the restaurants each year moved in commerce (A. 143a) and that the restaurants served many

[1] Defendants filed an answer February 5, 1965, an amended answer August 23, 1965, and were permitted by the district court to file a second amended answer March 19, 1966. All generally denied the allegations of the complaint.

interstate travelers (A. 145a). It concluded for both reasons that the operation of the six restaurants affected commerce within the meaning of Title II, 42 U. S. C. §2000a-(c)(2).

Despite denials of Negro exclusion in the pleadings, the president of the corporation, a corporation bookkeeper, and a waitress testified that Negroes were served only on a kitchen door take-out basis (A. 91a, 98a, 101a, 118a). The district court found also that two plaintiffs had been denied service at one of the restaurants because of race (A. 143a-144a). Attorneys for the plaintiffs were forced to spend substantial time before the trial amassing evidence to rebut defendants' denials in the pleadings that a substantial amount of the food it served moved in commerce. A large portion of the two day trial was devoted to proving that the beef, sugar, Coca-cola, vegetables, cheese, salt and other produce used by defendants came from outside South Carolina. (These pages of the original record were not printed by petitioners, in the interests of keeping the Appendix concise.) (R. pp. 20-110).

Although the district court found discrimination, and that operation of the six restaurants affected commerce, it excluded the five drive-ins from coverage on the ground that Congress had not intended Title II to apply to drive-ins. It entered an order enjoining racial discrimination at the Sandwich Shop only, and awarded Negro plaintiffs their costs, but refused to award counsel fees (A. 158a).

Plaintiffs appealed to the United States Court of Appeals for the Fourth Circuit; the United States filed a brief *Amicus Curiae* which supported plaintiffs' position that the drive-in restaurants were covered by the Act and did not direct itself to the counsel fee issue. The Court of

Appeals, sitting *en banc*, agreed, holding that the district court should have enjoined racial discrimination at all restaurants operated by the defendants.

The Court of Appeals further instructed the district court "to consider the allowance of counsel fees, whether in whole or in part," and set forth the "subjective" test which district courts should apply to determine whether to permit recovery of counsel fees (A. 165a):

> In exercising its discretion, the district court may properly consider whether any of the numerous defenses interposed by defendants were presented for purposes of delay and not in good faith. But the test should be a subjective one, for no litigant ought to be punished under the guise of an award of counsel fees (or in any other manner) from [*sic*] taking a position in court in which he honestly believes—however lacking in merit that position may be.

Judge Winter, with whom Judge Sobeloff joined, disagreed with the majority conclusion that "good faith, standing alone," should "immunize a defendant from an award against him." Judge Winter examined the relationship of the provision for recovery of counsel fees to enforcement of Title II, and concluded that a "subjective" test would frustrate compliance (A. 166a-167a):

> In providing for counsel fees, the manifest purposes of the Act are to discourage violations, to encourage complaints by those subjected to discrimination and to provide a speedy and efficient remedy for those discriminated against. If counsel fees are withheld or grudgingly granted, violators feel no sanctions, vic-

tims are frustrated and instances of unquestionably illegal discrimination may well go without effective remedy. To immunize defendants from an award of counsel fees, honest beliefs should bear some reasonable relation to reality; never should frivolity go unrecognized.

Petitioners are represented by retained private counsel of Columbia, South Carolina, who have been assisted by salaried attorneys of a nonprofit civil rights organization. The award of counsel fees is sought only by the retained South Carolina counsel for their services, and not for others.

Summary of Argument

Congress has left to the courts the determination of the proper standards for awarding reasonable attorneys' fees in cases arising under the public accommodations title of the Civil Rights Act of 1964. Petitioners submit that the subjective bad faith standard formulated by the court below is improper because it fails utterly to further the purposes of the Act, and in fact inhibits them. To require proof of an insincere state of mind is unworkable, inconsistent with the legislative history, and holds Congress to have done no more than codify a pre-existing equity power of the federal courts.

The purpose of the counsel fee provision is to avoid personal financial loss to private plaintiffs who perform an essentially public function when they bring injunction actions to desegregate facilities which have failed to comply with the law, and to encourage attorneys to take Title II cases. The standard which best effectuates this purpose

allows counsel fees to prevailing plaintiffs as a matter of course, absent unusual circumstances. The formulation of the judges concurring specially below—award of counsel fees only when defendants raise frivolous defenses or employ dilatory tactics—is also a workable standard. It would deter vexatious conduct once suit was filed but it would not materially advance the public policy of Title II by encouraging initiation of Title II actions against recalcitrant discriminators. Under either the standard urged by petitioners or that formulated by the concurring judges below, the judgment below should be vacated and the cause remanded to the courts below with instructions that counsel fees should be awarded to these petitioners.

ARGUMENT

I.

Whether Counsel Fees Are Awarded to a Prevailing Plaintiff Under the Public Accommodations Title of the Civil Rights Act of 1964 Should Not Turn on the Subjective Mental State of the Defendant.

The counsel fees provision of Title II of the Civil Rights Act of 1964, 42 U. S. C. §2000a *et seq.*, is an integral part of a comprehensive scheme to secure civil rights for all Americans without regard to race. Enactment of this statute marked a watershed in the history of race relations in America, and the public accommodations title has become the most conspicuous symbol of the change. Congress undertook to write a sweeping law which would bring about the maximum desegregation of public accommodations in the shortest possible time. For the Act to be successful,

compliance with it had to be universal, for reasons both psychological and economic. First, not much would be accomplished if only some restaurants and lodges desegregated, for it is scant consolation to the Negro traveler that many facilities are desegregated if the one he enters continues to discriminate. Second, commerce is burdened by uncertainty itself when not all eating facilities have desegregated. And third, individual covered establishments in some communities might find it profitable to avoid compliance if they could avoid being brought to task. Congress therefore enacted "most comprehensive" substantive provisions, see *Heart of Atlanta Motel* v. *United States,* 379 U. S. 241, 246 (1964), which extended the coverage of the Act to the constitutional limits of the Commerce power, 42 U. S. C. §§2000a (b) (1-4), 2000a (c), and the power of Congress under the Fourteenth Amendment, 42 U. S. C. §§2000a (d), 2000a-1, and prohibited any attempt to deprive any person of his rights under the Act, 42 U. S. C. §2000a-2; see *Hamm* v. *City of Rock Hill,* 379 U. S. 306 (1964); *Georgia* v. *Rachel,* 384 U. S. 780 (1966). In addition, Title II comprises a series of related provisions, including the section on counsel fees, which provide for rapid and effective enforcement of the newly created statutory rights and in many ways encourage use of the federal courts against recalcitrant public accommodations: by permitting the "commencement of the civil action without the payment of fees, costs, or security" where necessary, 42 U. S. C. §2000a-3; by permitting the United States Attorney General to bring civil actions for injunctive relief when a pattern or practice of discrimination exists, 42 U. S. C. §2000a-5 (a); by authorizing three-judge courts to hear suits of general public importance, 42 U. S. C. §2000a-5 (b); and by suspending, in Title II suits, the doc-

trine of exhaustion of administrative remedies, 42 U. S. C. §2000a-6(a). These sections, like the counsel fee section, were drafted in response to the desire of Congress to provide Negro plaintiffs with easy access to the courts for redress of grievances, so that demonstrations like those preceding passage of the law would not be necessary in the future.

A. *The Fourth Circuit's standard.*

Central to the provisions for enforcement of Title II is the counsel fee provision, 42 U. S. C. §2000a-3(b). The legislative history of this section is meager, but by making the award of counsel fees discretionary, Congress evidently left it to the courts to evolve standards for the implementation of this section which would best advance the purposes of the Act. What little the legislative history reveals is inconsistent with the majority opinion below—awarding attorneys' fees only where the defendant was in subjective bad faith. Senator Miller, opposing an amendment that would have deleted this section, suggested that attorneys' fees would be granted in "meritorious" cases, 110 Cong. Rec. 14214, June 17, 1964, and neither he nor anyone else suggested that a subjective mental state evincing bad motives was to be a prerequisite for an award of reasonable fees. Three other factors also demonstrate that the subjective bad faith standard is not a proper construction of 42 U. S. C. §2000a-3(b). First, such a construction holds Congress to have done nothing more in the section than codify existing law, for long before the Civil Rights Act, federal district courts had inherent power to do what the Fourth Circuit's reading of the section authorizes; that is, to award counsel fees to a successful plaintiff where a defense is maintained "in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 Moore's Federal Practice

1352. See *Vaughn* v. *Atkinson*, 369 U. S. 527 (1962). And for years federal courts have been imposing such costs in racial discrimination cases where manifest insincerity and bad faith have been shown. *Bell* v. *School Board of Powhatan County*, 321 F. 2d 494 (4th Cir. 1963); *Rolax* v. *Atlantic Coast Line R.R.*, 186 F. 2d 473 (4th Cir. 1951). Statutes authorizing awards of counsel fees in private litigation are unusual departures from the general American rule of letting the costs of counsel lie with the party hiring counsel; such statutes should not be read to add nothing to the power of the federal courts. This conclusion is bolstered by the fact that the Senate rejected a move to delete the counsel fee provision on the ground that to grant counsel fees conflicted with the prevailing practice, 110 Cong. Rec. 14214 (June 17, 1964).

Second, the court below said that "the test should be a subjective one, for no litigant ought to be punished . . . from *(sic)* taking a position in court in which he honestly believes—however lacking in merit that position may be" (A. 165a). But it will rarely be possible for a plaintiff to prove the subjective state of mind of a defendant. This is a fact about which all of the evidence is in the defendant's possession. Occasionally a defendant may make a statement during trial reflecting on his state of mind which will be adverse to his position, but the award of reasonable counsel fees could not have been intended to turn upon such a fortuity which bears no rational relationship to increasing the extent of desegregation.

Finally, it seems impossible to apply a subjective standard at all where, as is often the case and is the case here, a defendant is a corporation. Just whose intent the district court is to look to under the Fourth Circuit standard is

unclear. The general counsel's, since he decides which defenses to interpose? What if the company has more than one counsel, and each attorney has a different state of mind? Should the court look to the intent of the directors on the theory that they directed the work of the counsel and are generally responsible for what he does? Again, what if the directors differed in whether they "honestly believed" that a defense was a serious one? Of what relevance are the beliefs on the stockholders, the true owners of the defendant corporation? All of these considerations make it unreasonable to interpret §2000a-3(b) to require a vexatious state of mind.

B. *The standard which best effectuates the ends of Title II.*

In order to determine the counsel fee standard which best effectuates the purposes of Title II it is necessary to examine the function of the private remedy which Congress authorized. It was plain when Congress passed the Act that to the extent universal voluntary compliance was not achieved, widespread use of the courts would be necessary to ensure maximum desegregation. In fact although voluntary compliance was quickly achieved in many major cities, and large chain restaurants and lodges adhered to the Act immediately, hundreds of smaller establishments, particularly in the small cities and rural areas of the South, have not yet conformed to the Act.[2] Hundreds of suits will be

---

[2] As a recent survey by the New York Times ("Integration in South: Erratic Pattern") put it:

> It is possible to motor through the green valleys of Virginia, veer through the cotton fields in Alabama and Mississippi, and

necessary before equal access to all public accommodations in the South is a reality. Since the Justice Department could not be burdened with hundreds of suits of this type, Congress limited the Department's role to cases involving a "pattern or practice of resistance", and relied primarily on private litigants to bring the bulk of the lawsuits necessitated by obduracy. The counsel fee provision is crucial to this enforcement device. Plaintiffs under the Act may secure only injunctive relief, never damages. Yet the time and effort which a plaintiff's attorney must put into preparing and arguing a contested case are frequently substantial, as is shown by this record, especially when the proportion of food the facility purchases in interstate commerce must be proved. Relatively few Negroes are likely to bring a suit if they are required to spend significant amounts of their money to integrate each diner at which they desired to eat, and few attorneys are likely to waive a fee. Nor should they have to. When a Negro brings an injunctive suit, he does so not only for himself, but for all Negroes and whites who wish to eat in integrated facilities, and even for hundreds of thousands of Americans who will never eat at the defendant's establishment, but who, through their representatives, chose to make this a country in which no man was afforded second-class citizenship be-

---

end up in Texas cattle country with the conviction that racial segregation and discrimination are gone at last.

You could get that impression if you dined at chain restaurants like Howard Johnson's, slept in chain motels such as the Holiday Inns, . . .

A different itinerary might leave you convinced that the South has not changed at all. Asking for a night's lodging in an obscure motel can be risky for a Negro who wants to avoid embarrassment. And in countless small towns, independent restaurants cater mainly to an all-white clientele, and Negroes still watch movies from segregated balconies. (N. Y. Times, May 29, 1967, p. 1, col. 1.)

cause of the color of his skin. A Title II suit is a private action in form only; it is in reality a public suit, and the plaintiff is in effect a "private attorney-general" advancing a public policy of the highest priority. *Cf.*, Comment, Private Attorneys-General: Group Action on the Fight for Civil Liberties, 58 Yale L. J. 574 (1949). The many enforcement provisions of the Act, *supra* at p. 8 are designed to encourage such litigation by individual plaintiffs, on behalf of this wider public interest. The counsel fee provision, properly construed, is a key feature in rendering this system workable. Negro plaintiffs must have a certain amount of motivation and perhaps courage, but Congress has designed the statute so that they need not be wealthy, and neither they nor their attorneys need subsidize a public activity from their own pockets.[3] It is because the court below misconstrued the nature of a Title II suit that it arrived at too limited a formulation of the conditions for an award of counsel fees. Public accommodations do not have a right to maintain segregated facilities

---

[3] The theory that the purpose of counsel fees may be to encourage "public" litigation by private parties, by saving them whole should they win, is an accepted device. For example, in Oregon, union members who succeed in suing union officers guilty of wrongdoing are entitled to counsel fees both at the trial level and on appeal, because they are protecting an interest of the general public:

> If those who wish to preserve the internal democracy of the union are required to pay out of their own pockets the cost of employing counsel, they are not apt to take legal action to correct the abuse. . . . The allowance of attorneys' fees both in the trial court and on appeal will tend to encourage union members to bring into court their complaints of union mismanagement and thus the public interest as well as the interest of the union will be served.

Gilbert v. *Hoisting & Portable Engineers*, 237 Or. 139, 390 P. 2d 320 (1964). See also *Rolax* v. *Atlantic Coast Line R.R.*, 186 F. 2d 473 (4th Cir. 1951).

until sued. They have a duty to integrate. The purpose of the counsel fee section is not merely to punish a defendant who adopts obstructionist tactics during a trial which should never have been required in the first place; rather, the purpose is to encourage the bringing of suits against public accommodations which fail to perform their basic obligations under the Act.

The construction of §2000a-3(b) which best promotes these ends is for the lower courts always to presume that prevailing plaintiffs are entitled to counsel fees unless very special circumstances render such a disposition unjust.[4] Prevailing defendants, on the other hand, need not routinely receive counsel fees. No analogous public policy encourages restaurants just beyond the coverage of the Act to resist integration by every means possible. Though the Act permits district courts to award counsel fees to the prevailing "party", it would be sufficient to award such fees to a prevailing defendant only when the initiation or conduct of plaintiff's suit was manifestly frivolous (as, for example, when another plaintiff had just lost a suit against the same defendant). Such standards ideally serve the function of the Act: they promote integration of public accommodations. They do not render §2000a-3(b) subject to the objection which has thus far prevented awards of counsel fees to the prevailing party from becoming a standard feature of American jurisprudence[5]—that they dis-

[4] For example, it might arguably have been proper to let attorneys' fees rest with the respective parties in the very first case testing the constitutionality of the Act, since defendants challenging the statute on constitutional grounds would also be performing a public function.

[5] In no other country in the world is the prevailing party in a civil suit required to bear the expense of enforcing his just claim. Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Cal. L. Rev. 792, 793 (1966).

courage the poor from bringing lawsuits because they might have to pay an uncertain amount of defendant's counsel fees. See *Fleischman* v. *Maier Brewing Co.*, 386 U. S. 714, 718 (1967). Nor are they inconsistent with the Act's grant of "discretion" to the district courts. Such discretion is properly applicable to a determination of the "reasonable" amount of fees awarded, rather than whether fees are to be awarded at all.

The above rules will lead to maximum enforcement, which must ultimately depend upon the energies of private litigants. Neither the Department of Justice nor the civil rights organizations have the money or the personnel that would be necessary to bring suits in hundreds of rural communities in the South. Although the Office of Economic Opportunity has sponsored the establishment of 292 "law offices for the poor", only 36 communities have such programs in the eleven states of the Confederacy (and Alabama has none). Significantly, petitioners' counsel has been informed that no neighborhood law office for the poor set up by the Office of Economic Opportunity has participated in a public accommodations case. Hopefully, the grant of counsel fees as a matter of course to plaintiffs successful in integrating public accommodations will not only further the purposes of the Act, but may ultimately involve a much broader segment of the bar in civil rights litigation; private attorneys will be more likely to accept a public accommodations case if they are offered a reasonable likelihood of being able to collect a fee from a solvent business enterprise.

C. *Judge Winter's standard.*

While the standard petitioners recommend will most soundly effectuate the Civil Rights Act, it is not the only workable standard. The interpretation given the counsel fee section by Judges Winter and Sobeloff, concurring specially below (awarding counsel fees against defendants who employ the dilatory tactics or raise objectively frivolous defenses), would at least deter defendants from imposing unnecessary burdens on plaintiffs and then claiming that their defenses, however frivolous, were in good faith. Such a standard would not encourage the bringing of Title II injunctive suits and thereby promote elimination of segregation, but would help significantly to expedite cases once brought.

II.

Under Either the Standard Sought by Petitioners or That Urged by Judges Winter and Sobeloff, the Case Should Be Remanded to the Courts Below With Instructions to Award Counsel Fees to Plaintiff.

The Fourth Circuit, remanding this case, ordered the district court to consider the allowance of counsel fees and added that "the test should be a subjective one" (A. 165a). If this Court agrees either with petitioners or with the concurring judges of the Fourth Circuit, different instructions must be given the district court. If petitioners' standard constitutes the correct construction of the Act, the court should be directed to award counsel fees because no extremely unusual reasons justified defendants in postponing compliance with the Act until after a trial (April 4, 5, 1966), rather than desegregating when the Act was

passed (July 2, 1964) or at the latest when this Court upheld the constitutionality of the law (December 14, 1964).

On the other hand, if the interpretation given the counsel fee section by Judges Winter and Sobeloff is the proper one, the district court should also be directed to award counsel fees, because it is plain that all or nearly all of defendants' defenses were frivolous and only served to increase the difficulty of proving plaintiff's case and put off the date of compliance. Defendants in this case pursued various theories that Title II was unconstitutional years after the question had been definitively resolved by this Court in *Katzenbach* v. *McClung,* 371 U. S. 291, in December, 1964. A second amended answer raising such defenses was filed March 30, 1966, after "carefully reviewing the pleadings heretofore filed" (A. 17a). Defendants also denied their activities affected commerce, forcing petitioners to offer hours of testimony to prove their case. After trial, the district court (which erroneously excluded the drive-in facilities on another ground) had no trouble determining that all six facilities were clearly covered by the Act both because a substantial portion of the corporation's food moved in commerce and because it served or offered to serve interstate travelers. Likewise, "the fact that the defendants had discriminated both at Piggie Park's drive-ins and at Little Joe's Sandwich Shop was, of course known to them, yet they denied the fact and made it necessary for the plaintiffs to offer proof, and the defendants could not and did not undertake at the trial to support their denials" (A. 167a). In addition, defendants interposed a series of utterly frivolous defenses, including claims that the Act was invalid because it "contravenes the will of God", that

it interfered with the "free exercise of Defendant's religion", that it constituted a taking without just compensation, that it denied defendants equal protection of the laws, that it abridged the defendants' privileges and immunities under Article 4, Section 2, and that it imposed on defendants an involuntary servitude. To permit defendants to require plaintiffs or their attorneys to bear the costs of presenting opposition to these defenses would severely restrict the effect of Title II and frustrate the design of Congress.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the judgment below be vacated and the cause be remanded to the courts below with directions to award counsel fees to petitioners.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL MELTSNER
10 Columbus Circle
New York, New York

MATTHEW J. PERRY
LINCOLN C. JENKINS, JR.
HEMPHILL P. PRIDE, II
1107½ Washington Street
Columbia, South Carolina

Attorneys for Petitioners